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IN THE
SUPREME COURT OF THE UNITED STATES

October Term, 1984

No. 84 - 883

HARVEY J. SNYDER, Jr., M.D.,
Petitioner,

v.

STATE OF OHIO, THE STATE MEDICAL BOARD,
Respondent.

Petition for a Writ of Certiorari
to the Court of Appeals for
Summit County, Ohio

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QUESTIONS PRESENTED FOR REVIEW

(1) Where an administrative body suspends a practitioner's license for violation of minimal standards, but fails to define those standards, has the practitioner been denied due process under the Fourteenth Amendment to the United States Constitution?

(2) Where an administrative body makes findings of fact diametrically opposed to testimony before it in suspending the license of a physician, has the physician been denied due process of law under the provisions of the Fourteenth Amendment to the United States Constitution?

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IN THE
SUPREME COURT OF THE UNITED STATES

October Term, 1984

No. 84-883

HARVEY J. SNYDER, Jr., M.D.,
Petitioner,
v.
STATE OF OHIO, THE STATE MEDICAL BOARD,
Respondent.

Petition for a Writ of Certiorari
to the Court of Appeals for Summit County, Ohio

The petitioner, Harvey J. Snyder, Jr., plaintiff-appellant below, respectfully petitions that a writ of certiorari issue to review the order of the Court of Appeals for Summit County, Ohio, in the captioned action. Petitioner's timely appeal to the Supreme Court of Ohio was dismissed **sua sponte** without opinion on September 12, 1984; his motion for rehearing was overruled on October 10, 1984.

Opinions Below

None of the decisions below have been reported. They are reproduced in the Appendix.

Jurisdiction

The jurisdiction of this Court is invoked under Supreme Court Rule 19 (1) (a).

Statutes Involved

The statutes involved in this case are Sections 119.12 and 4731.22 of the Revised Code of the State of Ohio. The relevant portions of the text of each of these sections are reproduced in the Appendix.

Statement of the Case

Petitioner is a physician licensed to practice medicine and surgery in the State of Ohio. In an administrative proceeding brought by respondent board, petitioner's license to practice medicine and surgery was suspended indefinitely, based upon petitioner's delivery of babies at home, where such deliveries deprived area hospitals and other physicians of more than $1,000,000 in charges and fees.

Respondent board found that petitioner had failed to conform to minimal standards of care for practitioners under the same or similar circumstances, but did not then, and has not ever, set forth what those standards are. It further affirmatively made its findings upon the hearsay testimony of an expert witness, whose testimony was seriously at odds with the testimony of persons physically present at the incident of which complaint was made.

The case below originated with a finding and order of respondent board; petitioner thereupon took his appeal to the Court of Common Pleas for Summit County. That court affirmed the finding and order of the board; on appeal to the Court of Appeals for Summit County, Ohio, the lower court's ruling was affirmed. The Ohio State Supreme Court dismissed petitioner's appeal from the Court of Appeals, without opinion, and petitioner filed his motion for reconsideration from that dismissal. The Ohio State Supreme Court overruled petitioner's motion for reconsideration, and he brings his petition to this Court.

FIRST QUESTION

The matter of suspension of a license to practice is a serious one, involving the livelihood of the practitioner; he is therefore entitled to clear notice of what practice is not acceptable. Notice, after the fact, that what he did was purportedly improper is a violation of fundamental due process.

This Court has heretofore held that it will recognize state licensure or disciplinary proceedings **unless**

> ...there was such an infirmity of proof as to facts found to have established the want of fair private and professional character as to give rise to a clear conviction on our part that we could not, consistently with our duty, accept as final the conclusion on that subject.... Selling v. Radford, 243 U.S. 46, at 51 (1917).

This Court has also spoken specifically and directly on the subject of due process in professional licensure:

> A State cannot exclude a person from the practice of law or from any other occupation in a manner or for reasons that contravene the Due Process or Equal Protection Clause of the Fourteenth Amendment. Schware v. Board of Bar Examiners, 353 US 232 (1957) (opinion by Black, J.).

In the State of Ohio, the present condition of the law is such that a physician or other professional may

find that he has violated unstated, ephemeral, standards that have changed after his actions have taken place. Such as where, as here, a physician engages in the home delivery, contrary to current medical fashion. This is clearly a situation where the occupational rights of professionals to procedural due process can be, and are, infringed.

SECOND QUESTION

The second question is involved with the first one in the matter that due process must be accorded to one whose privilege to practice an occupation is under consideration. Where the findings made by the administrative body are unsupported and unsupportable by the facts, as construed **against** the petitioner, due process has not been accorded him. The citations given under the first question above are apposite here.

REASONS WHY THE WRIT SHOULD BE GRANTED

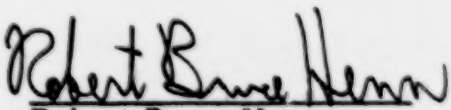
The writ should be granted to permit this Court to articulate criteria by which State standards for professional licensure must be promulgated, in order to prevent ex-post-facto application of professional stan-

dards. Until State licensure criteria are made Constitutionally proper, professionals throughout the United States will be subject to arbitrary deprival of their right to pursue their chosen occupations.

CONCLUSION

Petitioner asks this Court to issue its writ of certiorari to the Court of Appeals for Summit County, Ohio, in order that this Court may review that judgment and determine whether its reversal would be proper.

Respectfully submitted,



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REPORT AND RECOMMENDATION
IN THE MATTER OF HARVEY J. SNYDER, JR., M.D.

The matter of Harvey J. Snyder, Jr., M.D., came before me, Leonard L. Lovshin, M.D., Member of the State Medical Board of Ohio for hearing on March 19, 1981 and June 24, 1981.

INTRODUCTION

1. In August of 1980, the State Medical Board issued an order to Dr. Snyder indicating that he would be unable to conduct obstetrical practice or to deliver babies. (States's Exhibit #1) The order is on appeal, but it has never been stayed, therefore, since August 18, 1980, Dr. Snyder has been ordered by the State Medical Board not to operate an obstetrical

practice or to deliver babies. (Transcript at 7)

2. It is alleged by the State Medical Board that Dr. Snyder has continued to operate an obstetrical practice and to deliver babies:

A. One Mary Litten received prenatal care from Dr. Snyder on September 26, 1980. Specifically, Dr. Snyder examined her abdomen and indicated that the baby was due very soon thereafter. (State's Exhibit #2) Later the State decided not to present her testimony so this charge was dropped.

B. It is alleged that on or about September 25, 1980, Dr. Snyder did deliver the baby of Elizabeth Cline. Further, it is alleged that Dr. Snyder's conduct with respect to Elizabeth Cline and her baby, was not only in violation of the Board's order, but below minimal standards of care as the

clause is used in Section 4731.22(B)(6), Ohio Revised Code. (State's Exhibit #2)

3. State's Exhibit #3 is a letter from Michael Weigand, an attorney for Dr. Snyder, requesting a hearing on behalf of Dr. Snyder.

4. State's Exhibit #4 and #5 are copies of scheduling notices. Copies of these were sent to Mr. Weigand and Dr. Snyder. Neither Dr. Snyder nor his attorney appeared at the March 19, 1981 hearing although Dr. Snyder and his counsel were duly notified. Mr. Jeffrey J. Jurca, Assistant Attorney General, indicated that he had agreed with counsel for Dr. Snyder that he would present the State's witnesses on direct examination and proffer exhibits. It was agreed that counsel for Dr. Snyder would cross-examine the witnesses and object to the exhibits at a later date.

At the June 24, 1981 hearing, Dr. Snyder was represented by attorneys Robert Bruce Henn and Bernard L. Moutz.

5. Dr. Gary Benfield was sworn in as witness for the State. His testimony revealed the following:

A. Dr. Benfield is a physician licensed to practice medicine in the State of Ohio. He is Board Certified in Pediatrics and Neonatal-Pertinatal Medicine.

B. Dr. Benfield became involved with the Cline baby on September 25, 1980 following admission of the baby to Children's Hospital in Akron, where Dr. Benfield is on the staff. The Cline baby was transported from Dr. Snyder's office, and was admitted in the early morning, and put in the Newborn Intensive Care Unit.

C. Dr. Benfield presented a history of the case as follows: The baby was quite sick at the moment of birth. It was not breathing. Dr. Snyder attempted to resusitate the baby. Dr. Benfield feels the resuscitation method used and Dr. Snyder's action concerning Miss Cline are totally inadequate and would be a departure from or a failure to conform to minimal standards of care of similar practitioners in the same or similar circumstances. (Transcript at 15-17)

D. The baby had a ruptured liver, was near death, and needed emergency surgery. Dr. Benfield felt that when Dr. Snyder massaged the epigastric region repeatedly and deeply to force air out of the lungs this stripped the capsule of the liver and caused the problem. (Tran script I at 20-21, Transcript II at 39)

E. The hospital records of the Cline baby were admitted to the record. (State's Group Exhibit #6)

6. Dr. Louis DeGreefe was sworn in as a witness for the state. His testimony revealed the following:

A. Dr. DeGreefe is a second year resident OB-GYN at Aultman Hospital.

B. Dr. DeGreefe was part of the transport team (a resident, a nurse, and the ambu lance driver) that made a visit to Dr. Snyder's office on the 25th of September, 1980.

C. When Dr. DeGreefe first saw Miss Cline's baby it was very pink and was in no obvious distress.

D. Dr. Snyder told Dr. DeGreefe that when the baby was delivered, it was not breathing. Dr. Snyder said that he put the baby to his mouth and blew in the baby's mouth. Nothing else was said about the resuscitation. Dr. Snyder didn't use an Ambubag because he didn't have one. An Ambubag is a rubberized container that is squeezed with a mask that fits over the baby's face so that oxygen can be delivered to the baby's lungs.

E. Dr. DeGreefe feels that an Ambubag is a much better method of securing breath ing of a baby who is having trouble. When no Ambubag is present, the mouth to mouth method utilized by Dr. Snyder is valid. However, Dr. DeGreeefe feels it would be prerequisite to have an Ambubag available in a situation where a

doctor was preparing to deliver a baby. (Transcript II at 25-26)

7. Miss Elizabeth Cline was sworn in as a witness for the state. Her testimony revealed:

A. Dr. Snyder knew that it takes an hour and a half for Miss Cline to get to his office from her home.

B. Dr. Snyder suggested that Miss Cline come to his office to be checked on September 24 about four weeks before her baby was due. It appears she arrived in the early afternoon. She was in labor and partly dilated. Her water had broken and the contractions were about 15 minutes apart. Dr. Snyder told Miss Cline that she was dilated about one centimeter, and the baby was in the right position. Nothing was said about the possibility of a breech birth. By the

time she got home that evening, the pains were more frequent. She was nauseated and got chills and was getting sick. Miss Cline called Dr. Snyder and came back to Barberton. By the time she arrived, she could feel the presenting part which turned out to be the baby's buttocks. It was a breach presentation. Dr. Snyder was panicking while he was trying to deliver the baby, he couldn't find his gloves or forceps.

C. When the baby was born, it was blue. Dr. Snyder tried mouth to mouth resuscitation and then he dipped the baby in a pan of water. The baby remained blue. The baby turned pink after Mrs. Snyder gave her the oxygen. (Transcript II at 61-62)

D. Mrs. Snyder suggested Dr. Snyder call

the hospital. Finally, she gave him a direct order to call the hospital.

E. The morning after the baby was born, Miss Cline had breakfast at the Snyder's home. The housekeeper was present. Miss Cline remembered discussing the birth of the baby with the housekeeper. Miss Cline doesn't recall telling the housekeeper that she thought Dr. Snyder had done a great job or that she was very thankful for his delivery of the baby. (Transcript II at 64)

8. Ms. Emily Arcuri was sworn in as a witness for the state. Her testimony revealed:

A. Miss Cline called Dr. Snyder at 3:00 on September 24, 1980. He said for her to come to his office and he would check her. Miss Cline and Ms. Arcuri arrived at Dr. Snyder's office about 4:30 or 5:00.

Dr. Snyder said that Miss Cline was not ready to have the baby yet and he told her to go back home and wait. (Transcript at 48)

B. When Ms. Arcuri and Miss Cline got back home Miss Cline started having a blood discharge. Dr. Snyder was called and he told Ms. Arcuri to bring Miss Cline back. The arrived at Dr. Snyder's office about 10:30.

Ms. Arcuri was with Miss Cline at the time the baby was born.

C. Ms. Arcuri felt that Dr. Snyder panicked as he was delivering the Cline baby. She doesn't know what a physician normally would do in this situation, but she has seen people act panicky before. Dr. Snyder went to get something out of his cabinet. He couldn't find it.

D. When Dr. Snyder was delivering the baby, he held it around the waist and was just tugging. The baby was born blue. Dr. Snyder was blowing in the baby's mouth and administering mouth to mouth resuscitation. Dr. Snyder started pushing on its solar plexus area.

E. The baby's color did not change much until the baby was wrapped in warm blankets and oxygen was administered. (Transcript at 53)

F. When Dr. Snyder was working on the baby, Miss Cline was just laying there bleeding. Mrs. Snyder told Dr. Snyder, "You better stitch her up because she is bleeding pretty bad." (Transcript at 54)

G. Ms. Arcuri believes Mrs. Snyder told Dr. Snyder to call the hospital.

9. George Kuzmishin, M.D., was sworn in as a witness for the respondent. He testified to the following:

A. Dr. Kuzmishin is a general surgeon. He has known Dr. Snyder for 20 years, purely in a professional capacity.

B. When Dr. Snyder refers a patient to Dr. Kuzmishin for a surgical procedure, Dr. Kuzmishin has found, as a rule, the diag nosis has been correct. (Transcript II at 89)

C. Dr. Snyder has never referred a pregnant woman to Dr. Kuzmishin, as far as he can remember.

10. Dr. Harvey Snyder was sworn in as a witness. His testimony revealed:

A. It was his understanding at the time he took Miss Cline as an obstetrical patient that the Board's earlier order had been stayed by virtue of appeal to the Court of Common Pleas of Summit County, and therefore, to the best of his knowledge, he was operating within the purview of the law.

B. Dr. Snyder did not know where Shelby, Ohio was when he started treating Miss Cline. She never specifically told the doctor where it was or how long it took her to get to his office.

C. When Dr. Snyder first saw Miss Cline on September 24, 1980, and examined her, he found her membranes were leaking, she was having little or no contractions, the mouth of the womb was tight shut, and the baby was head down. (Transcript II at 94, 103)

D. Concerning Elizabeth Cline, his diagnosis at the time she first presented herself on September 24, 1980, was that the baby was in a frontal presentation position and there was no complication. When Miss Cline came to him the second time, the baby had rotated and was in a breech position.

E. Dr. Snyder did not feel that there was a danger of infection when he sent Miss Cline home with her membranes ruptured. Dr. Snyder cited a textbook pre pared by Dr. Eastman of Harvard Uni versity that states that if a doctor avoids any cervical examination and the patient does not engage in coitus, there should be no problem with infecting even though the membranes are ruptured. (Transcript II at 98)

F. Miss Cline called Dr. Snyder about 9:00 that evening. He got the delivery room area of his office ready.

G. At the time she came to his office, at about 10:30 that evening, the baby was in fetal distress and there was no time do anything but deliver the baby right away or risk damage to the baby or the death of the baby.

H. The doctor called his wife and tried to get the baby out be telling Miss Cline to "push".

I. Dr. Snyder never attempted to rotate the baby when it started coming out.

J. When the baby started coming out it didn't look pink. Dr. Snyder started looking for his forceps. Other than the piper forceps all the other instruments

Dr. Snyder needed were on the table.

K. When the baby came out it was limp. There was no muscle tone at all. Dr. Snyder started immediately giving the baby mouth to mouth resuscitation. He has previously used this procedure on newborn babies.

L. A doctor might put his hand over the baby's stomach area and push down gently to see if there is an air bubble there. There would be no point in pushing down hard. The baby didn't burp so apparently the air Dr. Snyder was giving to the baby was going into it's lungs.

M. After the baby was breathing, someone, either the doctor or his wife, got a pan of warm water to warm the baby. The Dr. Snyder's wife warmed up blankets and put the baby in them.

N. After the baby was delivered Dr. Snyder did have a discussion with his wife as to whether or not the baby should be hos pitalized. It was decided to be on the safe side, the hospital should be called. (Transcript II at 120)

O. Dr. Snyder did not talk to Dr. Benfield on the phone the next morning. Dr. Snyder denies telling Dr. Benfield that he massaged the baby's epigastric region deeply in order to stimulate breathing. (Transcript II at 124)

P. Any injury that occurred to the baby was almost a necessary adjunct to the breech delivery, which is sometimes very dif ficult, and in the course of such delivery sometimes the baby can suffer internal injury. The tear to the liver capsule was not because of anything that Dr. Snyder did in the course of the resuscitation,

but rather occurred during the delivery and was unavoidable.

Q. The Cline's baby liver was not damaged, the capsule had merely come loose. The operative report doesn't tell of there being an damage to the liver, either on the surface or internally. (Transcript II at 137)

11. Respondent's Exhibit #1 was marked for identification and introduced expressing the opinion of Dr. Gauderer from the University of Pediatric Surgical Association, Incorporated from Cleveland, Ohio. It concerns Dr. Gauderer's opinion about the matter of the breech delivery. He states, "the liver is proportionately very large in newborns, and not as well protected as in older children and adults. It is not surprising, therefore, that the injury of this organ is possible."

12. Carol Beth Snyder was sworn in to testify on behalf of the respondent. Her testimony revealed:

A. Carol Beth Snyder is married to Dr. Snyder. She is a R.N., and sometimes acts as a nurse for Dr. Snyder.

B. When the baby came out it was blue and limp.

C. The water that the baby was put in was not warm enough, so Mrs. Snyder put the baby in warmed up blankets.

D. Dr. Snyder had no problems finding his instruments, it was Mrs. Snyder's fault. (Transcript II at 165)

E. Mrs. Snyder said it was her husband's decision to sen the baby to the hospital. (Transcript II at 167)

13. Dr. Richard Cotterman was called as a witness for the respondent. His testimony revealed:

A. Dr. Cotterman is a specialist in anesthesiology. In the field of anesthesiology the doctor does have occasion to resuscitate patients.

B. In the case of small children an Ambubag is one of the accepted ways to resuscitate them. Mouth to mouth resuscitation is also an acceptable method.

C. Dr. Cotterman has known Dr. Snyder about 31 years and feels he is a very competent physician, but he has never seen Dr. Snyder at work at his office.

14. Dr. Robert Roberts was sworn in to testify for the respondent. His testimony revealed the following:

A. Dr. Roberts' specialty is pulmonary medicine and critical care medicine.

B. Dr. Roberts has known Dr. Snyder about 10 years. He took an advanced cardiac life support course at Barberton Citizens Hospital with Dr. Snyder. There was instruction on both adults and children. The course that he and Dr. Snyder took certified them for two years. The next re-certification will be in 1982.

C. His experience with Dr. Snyder has always been good.

15. Dr. Vytantas Apynys was sworn in as a witness for the respondent. He testified to the following:

A. Dr. Apynys specializes in obstetrics. He does breech deliveries.

B. If a patient has an apparent breech condition, a cesarean section is not necessarily recommended. It depends on the condition of the individual. (Transcript II at 183)

C. In his experience, Dr. Apynys has had babies spontaneously turn within the uterus after a frontal presentation was diagnosed. Dr. Apynys had one patient whose baby turned within 4 hours before delivery, but the water hadn't broken. After the water has broken, it's not very possible that the baby will turn if the mother is in labour. (Transcript II at 198-200)

D. If there is a difficult birth from the breech position and the actual delivery of the baby is difficult in terms of getting the head out, there could be a possibility of internal injury to the child.

E. If a baby was injured internally in a difficult breech delivery, this would not necessarily mean that the attending physician had exercised less than proper care in that delivery. (Transcript II at 187)

F. Sometimes it's a choice between injuring the child and delivering a dead baby.

G. Mouth to mouth resuscitation to revive a baby is an excellent practice according to Dr. Apynys.

H. Dr. Apynys has known Dr. Snyder since 1960. He feels that Dr. Snyder is a competent doctor. (Transcript II at 191)

I. In a hospital setting where the patient comes in with the baby virtually in the stages of being delivered, with meconium present and obvious signs of fetal

distress, it would not be possible to section that woman to deliver that baby because the baby would die. (Transcript II at 192-193)

J. According to Dr. Apynys, if you had a patient whose membranes have ruptured, but her cervix was not dilated at all, then sending her home would not be below minimal standards of care. However, Dr. Apynys would not send her home if she lived approximately an hour and a half away.

16. Terry Parsons was sworn in as a witness for the respondent. His testimony revealed:

A. Mr. Parsons attended the previous State Medical Board hearing which resulted in the Board action outlined in paragraph 1 above. At that time, Mr. Parsons heard Dr. Benfield say to Dr. Zuspan, "We have

been after Snyder for five years and now we finally got something to go on." (Transcript II at 206). Both Dr. Benfield and Dr. Zuspan appeared as witnesses for the state at that previous proceeding.

17. Muriel Williams was sworn in to testify for the respondent. She revealed the following:

A. Mrs. Williams helps out at Dr. Snyder's house. She was at the Snyder's house on September 25, 1980. She made Miss Cline breakfast that morning.

B. When Mrs. Williams had a conversation with Miss Cline and her friends and family that morning, praise was given for the way the baby was delivered. (Transcript II at 211)

18. Deborah Peterson was sworn in as a witness for the respondent. Her testimony revealed the following:

A. Mrs. Peterson is a former patient of Dr. Snyder's.

B. He delivered her baby which was a breech birth. She said that, "I've been doctored by some very very fine physicians in my lifetime and if medicine is an art, I would say Dr. Snyder is a master." (Transcript II at 224)

After considering all of the testimony and evidence presented at the hearing, and after having read the transcript and all exhibits intorduced, I make the following findings and reach the following conclusions:

FINDINGS OF FACT

1. After formal hearing, the State Medical Board of Ohio, on August 31, 1980, limited the certificate of Harvey J. Snyder, Jr., M.D., to practice medicine and surgery as follows:

> "Dr. Snyder shall cease all obstetrical practice in all settings, including office, home, and hospitals, shall not render any prenatal care to pregnant women, shall not render any post-natal care to mothers or infants, and shall not deliver babies."

2. The order was received by Dr. Snyder on August 23, 1980 and was not stayed or modified by court order.

3. Dr. Snyder did render prenatal care.

4. Despite the spontaneous rupture of Miss Cline's membranes at about 11:30 A.M. on September 24,

and her beginning labor shortly thereafter, Dr. Snyder, after examining the patient at about 4:30 P.M. advised her to return home (80 miles away) to await further developments. (Transcript I at 34-36)

5. A precipitous breech delivery occurred at Dr. Snyder's office at about 11:00 P.M., after the patient barely made it back from her home in Shelby, 80 miles away. The breech presentation of the baby had not previously been diagnosed.

6. The baby was not breathing when first born and was in critical condition.

7. Dr. Snyder didn't use an ambubag to resuscitate the baby because he didn't have one available. Instead, Dr. Snyder blew in the baby's mouth and administered mouth to mouth resuscitation, while pushing on the solar plexus area, Dr. Snyder then dipped the baby in a pan of water.

8. After the baby improved and had been transported to Childrens Hospital in Akron, an emergency operation had to be performed to control massive hemorrhage from a torn liver capsule. (Transcript I at 20-22)

9. The baby survived.

CONCLUSIONS

It is my conclusion that:

1. The obstetrical services performed by Dr. Snyder for Elizabeth Cline were in direct violation of a previous order of the State Medical Board which limited his certificate to practice medicine and surgery by forbidding all obstetrical practice.

2. Dr. Snyder's actions were below minimal standars of care as that clause is used in Section 4731.22(B)(6),

Ohio Revised Code in caring for Elizabeth Cline and her child in view of the fact that:

A. Dr. Snyder should not have sent the patient, Miss Cline, back to her home in Shelby 80 miles away after first examining her on September 24, 1980, and determining that her membranes had ruptured with leakage of fluid, she was partially dilated and in labor.

B. Dr. Snyder should have known that the baby was in a breech presentation which would present a complicated delivery.

C. Attempts at resuscitation were somewhat unorthodox and inadequate at first.

1. An ambubag should be available in a situation where a doctor is preparing to deliver a baby.

2. Dr. Snyder blew into the baby's mouth and administered mouth to mouth resuscitation, while pushing on the solar plexus area.

3. Dr. Snyder dipped the baby in a pan of water in hopes of reviving it. This procedure did not work and oxygen was finally administered.

3. After the baby was born it was transported to Children's Hospital in Akron. An emergency operation had to be performed to control massive hemorrhage from a torn liver capsule. This complication was most probably caused by maneuvers performed by Dr. Snyder during or after birth. Therefore, there was enough evidence presented to conlusively prove a violation of minimal standards of care in relation to this matter.

PROPOSED ORDER

The certificate to practice medicine and surgery of Harvey J. Snyder, Jr., M.D., is hereby suspended indefinitely.

This Order shall become effective immediately upon approval by the Board.

_____

Leonard L. Lovshin, M.D.

IN THE COURT OF COMMON PLEAS
COUNTY OF SUMMIT

HARVEY J. SNYDER, Jr., M.D. CASE No. 81 12 3266

Appellant Judge Baird

-vs-

STATE OF OHIO, JUDGMENT ORDER
STATE MEDICAL BOARD

This cause came on for the Court's consideration of an appeal filed by Appellant, Harvey J. Snyder, Jr. (hereinafter "Snyder"), following a decision by the Ohio State Medical Board (hereinafter "Board") which revoked Appellant's license to practice medicine in the state of Ohio.

On November 15, 1979, Appellant was advised by the Board that he had been cited for six alleged violations of the Medical Practice Act, O.R.C. Chapter 4731. On February 12, 1980 and March 11, 1980 hearings were held before an officer of the Board at Snyder's request, at which times both Appellant and Appellee presented witnesses and conducted cross-examination. Following a review of all the evidence, including exhibits admitted at the hearings, the full

Board issued an order on August 13, 1980, prohibiting Snyder from practicing obstetrics, rendering any pre-natal or post-natal care, and delivering babies. Snyder's license was only limited these respects, and did not otherwise prohibit him from practicing medicine. This decision was affirmed on appeal by the Summit County Common Pleas Court and subsequently by the Ninth District Court of Appeals.

Snyder was then given the opportunity for another hearing on evidence of allegations similar to those which precipitated the Board's order of August 13, 1980. Appellant appeared before a hearing officer without counsel on March 19, 1981 and with counsel on June 24, 1981. Following this hearing, the full Board ordered that Snyder's license to practice medicine be indefinitely suspended, effective upon the date of the decision. It is this decision that is the subject of this appeal. This Court stayed the suspension of Snyder's license on December 11, 1981, pending the outcome of this appeal.

The Board cited Appellant for alleged violations of the Medical Practice Act, Chapter 4731 of the Ohio Revised Code, to-wit: practicing medicine beyond the scope of his license (O.R.C. § 4731.22(B)(12)), as limited by the Board's order of August 13, 1980; and failing to conform to minimal standards of care in his practice, which standards are required of similar practitioners under the same or similar circumstances (O.R.C. §§ 4731.22(B)(6)).

Specifically, Snyder was cited by the Board for delivering Rhianna Cline, daughter of one Elizabeth Cline, on or about September 25, 1980, in violation of the limitations on Snyder's license to practice medicine. Further, the Board charged that Snyder failed to meet minimum standards of care in the treatment of Elizabeth Cline and the delivery and treatment of her baby.

Section 4731.22, O.R.C., mandates that the Board take action to "limit, reprimand, revoke, suspend, place on probation, refuse to register or reinstate a certificate (to practice medicine)," for certain violations outlined in the statute, including those with which

Snyder is charged. The decision as to the imposition of disciplinary action is discretionary with the Board, "to the extent permitted by the law."

This appeal is governed by the provisions of O.R.C. § 119.12, which sets out specific limitations on the scope of the Court's review in administrative appeals such as this. Specifically,

> The Court may affirm the order of the agency complained of in the appeal if it finds, upon consideration of the entire record ... that the order is supported by reliable, probative, and substantial evidence and is in accordance with law. In the absence of such a finding, it may reverse, vacate, or modify the order or make such other ruling as is supported by reliable, probative, and substantial evidence and is in accordance with law.

The Court must therefore determine whether:

1) there exists in the record reliable, probative, and substantial evidence that Appellant Snyder practiced medicine beyond the scope of his license, and

2) whether there exists in the record evidence that is reliable, probative, and substantial in nature to support the charge that Appellant Snyder departed

from, or failed to conform to "minimal standards of care of similar practitioners under the same or similar circumstances."

With respect to the Court's first area of examination, Snyder's testimony at the hearing on June 24, 1981 reveals that he was treating Elizabeth Cline and at least one other woman for pre-natal and obstetrical care. He recalled that, prior to Elizabeth Cline's arrival at his office on September 24, 1978 he "had just delivered another woman at approximately, oh, eleven o'clock in th morning there at the office, and this other woman was still on the delivery table an hour or so later ..." (T.O.P. p. 94). His testimony goes on to describe his treatment of Elizabeth Cline prior to and during her delivery.

Snyder testified he was aware of the order limiting his license by prohibiting him from practicing obstetrics, though he said he understood from his former attorney that a stay had been obtained on the order limiting his license, pending appeal of that decison. There is no evidence in the record to suggest that a

stay of the Board's ruling had been applied for or granted. The record reflects that the last communication Snyder had from the Board at that time was the notification fo the limitation placed on his license pursuant to the Board's order of August 13, 1980.

That order reads as follows:

"The certificate to practice medicine and surgery of Harvey J. Snyder, Jr., M.D. is hereby limited as follows:

> Dr. Snyder shall cease all obstetrical practice in all settings, including office, home, and hospital; shall not render any prenatal care to pregnant women; shall not render any postnatal care to mothers or infants, and shall not deliver babies . . .
>
> This order shall become effective immediately upon approval by the Board." (emphasis added)

The Board approved the order on August 13, 1980, and Snyder received a copy of the order on August 23, 1980. The content of the order does not appear to be confusing or ambiguous. The mandatory language is not conditioned upon a ruling on appeal, nor did it become

operative at the direction of Snyder's attorneys. The limitations placed on Snyder's license to practice medicine in this state are clear to the Court from the above order, and should have been equally clear to Snyder. Yet within one month of receiving that order, Snyder had resumed his obstetrical practice.

Appellant states that his attorneys advised him the order of the Board was not effective until the appeal had been taken, and that he could continue to practice obstetrics. Any reliance by Snyder on such advice was unreasonable and contrary to the finding of the Board as communicated to Snyder. The Ohio Revised Code makes no provision for limiting the liability of one who acts in contravention of an order of the Board on advice of attorney, but instead mandates that the Board discipline one for practicing medicine beyond the scope of his license.

Appellant looks to the disposition of a complaint filed in Barberton Municipal Court on November 12, 1980 as support for his contention that he is not guilty of the violations with which he is charged by the Board

in this case. The complaint alleged that Snyder was practicing obstetrics without a license, in violation of Ohio Revised Code § 4731.41. The Municipal Court construed the statute liberally, in favor of the defendant Snyder, and determined that Snyder's license had been "limited" but not "suspended" as charged in the complaint. Snyder was found not guilty of the offense as charged. This ruling is thus not determinative of the issue of whether or not Snyder practiced medicine beyond the scope of limitations placed on his license.

Snyder admitted: knowledge of the limitation on his license; practicing obstetrics in spite of that limitation; and delivering babies beyond the date when the Board's order became effective. The record thus provides reliable, probative, and substantial evidence, through Appellant's own testimony, that he did practice medicine beyond the scope of his license. The finding of the Board on this issue is therefore affirmed.

The question of whether or not Snyder acted in conformity with established procedures is a question of

fact, requiring for its determination an analysis of the medical procedures and methods followed by Snyder in the care of Elizabeth Cline and the delivery of her baby. Both Appellant and Appellee offered testimony by physicians wherein a professional opinion was given as to whether or not Appellant's conduct fell within the minum standards of care of practitioners under the same or similar circumstances. Physicians testifying for the Appellant related that methods used by Snyder were acceptable medical practice. Appellee's physicians testified that Snyder's methods were below the minimum standard of care. However,

> expert testimony as to a standard of practice is not mandatory in a license revocation hearing and the (medical) board may rely on its own expertise to determine whether a physician failed to conform to minimum standards of care... (T)he need for expert opinion testimony is negated where the trier of facts is possessed of appropriate expertise and is capable of drawing its own conclusions and inferences ... (The) medical board is capable of interpreting technical requirements of the medical field and is quite capable of deter-

mining when a certain conduct falls below a reasonable standard of medical care. Arlen v. Ohio State Medical Board (1980), 61 O.S. 2d 168, 173.

Thus, the Medical Board can properly discount the testimony of any or all physicians or "experts" who testified at the hearing, and is free to draw its own conclusions from the facts as related concerning the events preceding and following the birth of Rhianna Cline. Appellant's arguments speak to the weight of the evidence presented, and appear to request a ruling by this Court based on the weight Appellant alleges should have been given to the testimony of each witness. It is not the Court's prerogative to dictate to the Board which evidence shall be given greater weight. "The weight to be given to such expert opinion testimony depends on the board's estimate as to the propriety and reasonableness." Arlen, at 174.

Appellant argues that his medical procedures were acceptable, based upon the fact that the baby was resuscitated and survived. However, an analysis of procedures according to minimum standards of care

depends largely upon the methodology employed in comparison to accepted standards of care by professionals under the same or similar circumstances. The results achieved through use of the particular procedures under examination are not dispositive of the question.

The Ohio Legislature has established procedures, through Chapter 47 of the Ohio Revised Code, whereby the Ohio State Medical Board is given the authority to police the members of its profession according to standards adopted by the profession. The findings of the Board are based upon the collective expertise of its members, all medical professionals. This Court's review of those findings is necessarily narrow in scope. As noted before, the Court is limited to an examination of the record before it to ensure that the Board's ruling is supported by the evidence therein.

The Court finds that there is ample reliable, probative and substantial evidence in the record from which the Board could have concluded that Snyder departed from, or failed to conform to, "minimal stan-

dards of care of similar practitioners under the same or similar circumstances" in his treatment of Elizabeth Cline, and in the delivery and subsequent treatment of Rhianna Cline.

It is therefore ORDERED that the December 2, 1981 order of the Ohio State Medical Board, whereby the license of Harvey J. Snyder, Jr. to practice medicine in the state of Ohio was indefinitely suspended, be and is hereby affirmed.

It is further ORDERED that the stay granted Appellant by order of this Court on December 11, 1981, be and hereby is vacated and rendered null and void.

This order shall become effective on the third day after its filing.

Costs to Appellant.

/s/William R. Baird

JUDGE WILLIAM R. BAIRD

cc: Attorney Robert Henn
Attorney Bernard Moutz
Asst. Atty. Gen. Jeffrey Jurca

State of Ohio IN THE COURT OF APPEALS
ss: NINTH JUDICIAL DISTRICT
County of Summit

HARVEY J. SNYDER, JR., M.D. C.A. No. 11346

Plaintiff-Appellant

v.

STATE OF OHIO, STATE MEDICAL BOARD
Defendant-Appellee

APPEAL FROM JUDGMENT ENTERED IN THE COMMON PLEAS COURT COUNTY OF SUMMIT, OHIO CASE No. CV 81 12 3266

DECISION AND JOURNAL ENTRY

Dated: April 18, 1984

This cause was heard February 2, 1984, upon the record in the trial court, including the transcript of proceedings, and the briefs. It was argued by counsel for the parties and submitted to the court. We have reviewed each assignment of error and make the following disposition:

GEORGE, J.

The appellant, Harvey J. Snyder, Jr., appeals the judgment of the trial court affirming the Ohio State Medical Board's decision to revoke Snyder's license to practice medicine in Ohio. This court affirms the judgment.

On August 13, 1980, the board issued an order prohibiting Snyder from practicing obstetrics, rendering any pre-natal or post-natal care, and delivering babies. With the exception of these limitations, he was still permitted to practice medicine. The board's decision was affirmed by the trial court and the court of appeals.

After the board's decision of August 13, 1980, Snyder continued to practice obstetrics despite the limitations on his medical license. On December 2, 1981, the board indefinitely suspended Snyder's license. This order was affirmed by the trial court. Snyder appeals to this court raising the following assignments of error.

> "1. The State Medical Board of Ohio denied appellant due process of law by its failure to present reliable, probative and substantial evidence to support its order indefinitely suspending the right of appellant to practice medicine and surgery in the State of Ohio.
>
> "4. The Court of Common Pleas denied appellant due process of law by its failure to follow the mandate imposed upon it by O.R.C. Sec. 119.12."

Snyder was cited for violating R.C. 4731..22(B)(6) and (12); failing to conform to the minimal standards of care in his practice, and practicing medicine beyond the scope of his license. Snyder first argues that his actions were not beyond the scope of his license. He admitted that he continued his obstetrics practice after his license was limited by the board on August 13, 1980. However, he argues that he did so on the advice of his attorney, who informed him that he could continue practicing obstetrics while the board's order was being appealed.

The August 13, 1980, order of the board expressly stated that it was effective immediately. The record reveals that Snyder was not granted a stay of this order pending appeal. As such, Snyder's subsequent obstetrics practice was beyond the scope of his license. Snyder's claim that he was relying on the advice of his attorney is no defense. This is the general rule in criminal cases. 25 Ohio Jurisprudence 3d 168, Criminal Law, Section 63. This rule clearly applies to civil actions. See generally, McCrary v. Jones (1941), 34 Ohio Law Abs. 612; and Link v. Wabash R.R. Co. (1962), 370 U.S. 626.

Next, Snyder argues that the evidence does not support the board's finding that he failed to conform to minimal standards of care in his treatment of Elizabeth Cline. This court has reviewed the record and finds reliable, probative, and substantial evidence to support the board's decision.

Finally, Snyder argues that the trial court erred by refusing to weigh the evidence in determining whether Snyder failed to conform to the minimal standards of care. There was conflicting evidence concerning Snyder's medical skills. Upon appeal from the board's decision, the standard of review that guides the trial court is whether there exists reliable, probative, and substantial evidence to support the board's decision. R.C. 119.12. In Univ. of Cincinnati v. Conrad (1980), 63 Ohio St. 2d 108, 111, the Ohio Supreme Court defined this standard of review as follows:

> "***.
>
> In Andrews, this court acknowledged that determining whether an agency order is supported by reliable, probative and substantial evidence essentially is a question of the absence or presence of the requisite quantum

> of evidence. Although this in essence is a legal question, inevitably it involves a consideration of the evidence, and to a limited extent would permit a substitution of judgment by the reviewing common pleas court.
>
> ***.

However, the court went on to state that:

> ***.
>
> In undertaking this hybrid form of review, the court of common pleas must give due deference to the administrative resolution of evidentiary conflicts. ***.

In the instant case, there was conflicting testimony given by medical experts concerning whether Snyder's treatment to Cline met the minimum standard of care in his practice. The trial court refused to weigh this testimony. In Arlen v. State (1980), 61 Ohio St. 2d 168, 174, the Ohio Supreme Court stated:

> ***The weight to be given to such expert opinion testimony depends upon the board's estimate as to the propriety and reasonableness, but such testimony is not binding upon such an experienced and professional board.

***.

Clearly, the board's judgment should not be second guessed by the trial court. Thus, the trial court was correct in refusing to reweigh the expert testimony. Rather, the court properly found that the requisite quantum of evidence was present to support the board's order. Accordingly, these assignments of error are overruled.

ASSIGNMENTS OF ERROR:

"2. The State Medical Board of Ohio denied (sic) equal protection under law by its failure to set forth the minimal standards of care of similar practitioners under the same or similar circumstances in which appellant found himself.

"3. The State Medical Board of Ohio denied appellant due process of law by a failure to produce evidence of violation of minimal standards of care of the general practice of medicine and surgery, exclusive of obstetrics."

In Arlen v. State, supra, 172-173, the Ohio Supreme Court stated:

***.

> A medical disciplinary proceeding, such as in the instant cause, is a special statutory proceeding which purports to maintain sound professional conduct. The licensing board, which is comprised of individuals fitted by training and expertise to perform the duties imposed upon it, weighs and considers whether a certain act is one of 'reasonable care discrimination' or a departure from the 'minimal standards of care' within the medical profession.
> ***.

A physician must conform to reasonable standards of medical care based upon that used by practitioners under similar circumstances. Each physician is therefore charged with the knowledge of the appropriate medical standard of care. For this reason, the medical board, which is in major part composed of physicians, does not require expert opinion testimony to establish minimal standards of care. The board has its own expertise and is capable of drawing its own conclusions as to whether Snyder failed to conform to the minimum standard of care.

Accordingly, these assignments of error are overruled.

ASSIGNMENT OF ERROR 5

"The State Medical Board of Ohio denied appellant due process of law by its failure to consider written objections to the report and recommendation of its hearing officer before approval of the hearing officer's recommendation."

Snyder contends that the board failed to consider his objections to the hearing officer's report and recommendations. He argues that the trial court erred in excluding an affidavit purporting to represent the time spent by the board in reviewing his objections.

The record reveals that Snyder's objections were filed with the board and that these objection were subsequently considered. Evidence concerning the time taken by the board to read Snyder's objections is immaterial. As this court previously stated in Snyder v. State (October 21, 1981), Summit App. No. 10187, unreported, pg. 4, due process means the right to be heard. Snyder was entitled to notice, a hearing, proceedings according to law, and a judgment rendered on the facts adduced. Snyder was not denied due process of law. Thus, this assignment of error is overruled.

Accordingly, the judgment of the trial court is affirmed.

The court finds that there were reasonable grounds for this appeal.

We order that a special mandate, directing the County of Summit Common Pleas Court to carry this judgment into execution, shall issue out of this court. A certified copy of this journal entry shall constitute the mandate, pursuant to App. R. 27.

Immediately upon the filing hereof, this document shall constitute the journal entry of judgment, and it shall be file-stamped by the Clerk of the Court of Appeals, at which time the period for review shall begin to run. App. R. 22(E).

Costs taxed to appellant.

Exceptions.

Daniel B. Quillin

/s/_____
Presiding Judge
- for the Court -

QUILLIN, P. J.
MAHONEY, J.
CONCUR

APPEARANCES:

BERNARD L. MOUTZ, Attorney at Law
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Mogadore, OH 44260 for Plaintiff.

ROBERT B. HENN, Attorney at Law, 45 Public Square,
Medina, OH 44256 for Plaintiff.

ANTHONY J. CELEBREEZE, JR., Attorney General
30 E. Broad St., Columbus, OH 43215
for Defendant.

THE SUPREME COURT OF OHIO
COLUMBUS

1984 Term

To Wit: September 12, 1984

Harvey J. Snyder, Jr., M.D.,
Appellant,

Case No. 84-978

v

APPEAL FROM THE COURT OF APPEALS

State of Ohio, State Medical Board,
Appellee

for Summit County

This cause, here on appeal from the Court of Appeals for Summit County, was considered in the manner prescribed by law, and, no motion to dismiss such appeal having been filed, the court sua sponte dismisses the appeal for the reason that no substantial constitutional question exists herein.

FRANK D. CELEBREEZE
Chief Justice

It is further ordered that a copy of this entry be certified to the Clerk of the Court of Appeals for Summit County for entry.

I, James Wm. Kelly, Clerk of the Supreme Court of Ohio, do hereby certify that the foregoing order was correctly copied from the records of said Court, to wit, from the Journal of this Court.

IN WITNESS WHEREOF, I have hereunto subscribed my name and affixed the seal of said Supreme Court, this date 9/12/84.

/s/ James Wm. Kelly CLERK

_____ DEPUTY

Ohio Revised Code Section 119.12

Appeal by party adversely affected

Any party adversely affected by any order of an agency issued pursuant to an adjudication denying an applicant admission to an examination, or denying the issuance or renewal of a license, registration of a licensee, or revoking or suspending a license, may appeal from the order of the agency to the court of common pleas of the county in which the place of business of the licensee is located or the county in which the licensee is a resident, provided that appeals from decisions of the liquor control commission may be to the court of common pleas of Franklin county. If any such party is not a resident of and has no place of business in Ohio, he may appeal to the court of common pleas of Franklin county.

***

Any party desiring to appeal shall file a notice of appeal with the agency setting forth the order appealed from and the grounds of his appeal. A copy of such notice of appeal shall also be filed by appellant with the

court. Unless otherwise provided by law relating to a particular agency, such notices of appeal shall be filed within fifteen days after the mailing of the notice of the agency's order as provided in this section.

The filing of a notice of appeal shall not automatically operate as a suspension of the order or an agency. If it appears to the court that an unusual hardship to the appellant will result form the execution of the agency's order pending determination of the appeal, the court may grant a suspension and fix its terms. In the event an appeal is taken from the judgment of the court and the court has previously granted a suspension of the agency's order as provided in this section such suspension of the agency's order shall not be vacated and shall be given full force and effect until the matter is finally adjudicated. No renewal of a license or permit shall be denied by reason of such suspended order during the period of the appeal from the decision of the court of common pleas. The final order of adjudication may apply to any renewal of a license or permit which has been granted during the period of the appeal.

***

Within thirty days after receipt of notice of appeal from an order in any case wherein a hearing is required by sections 119.01 to 119.13 of the Revised Code, the agency shall prepare and certify to the court a complete record of the proceedings in the case. Failure of the agency to comply within the time allowed shall, upon motion, cause the court to enter a finding in favor of the party adversely affected. Additional time, however, may be granted by the court, not to exceed thirty days, when it is shown that the agency has made substantial effort to comply. Such record shall be prepared and transcribed and the expense thereof shall be taxed as a part of the costs on the appeal. The appellant must provide security for costs satisfactory to the court of common pleas. Upon demand by any interested party, the agency shall furnish at the cost of the party requesting it a copy of the stenographic report of testimony offered and evidence submitted at any hearing and a copy of the complete record.

Unless otherwise provided by law, in the hearing of the appeal the court is confined to the record as certified to it by the agency. Unless otherwise provided by law, the court may grant a request for the admission of additional evidence when satisfied that such additional evidence is newly discovered and could not with reasonable diligence have been ascertained prior to the hearing before the agency.

The court shall conduct a hearing on such appeal and shall give preference to all proceedings under sections 119.01 to 119.13 of the Revised Code, over all other civil cases, irrespective of the position of the proceedings on the calendar of the court. The hearing in the court of common pleas shall proceed as in the trial of a civil action, and the court shall determine the rights of the parties in accordance with the laws applicable to such action. At such hearing counsel may be heard on oral argument, briefs may be submitted, and evidence introduced if the court has granted a request for the presentation of additional evidence.

The court may affirm the order of the agency complained of in the appeal if it finds, upon consideration of the entire record and such additional evidence as the court has admitted, that the order is supported by reliable, probative, and substantial evidence and is in accordance with law. In the absence of such a finding, it may reverse, vacate, or modify the order or make such other ruling as is supported by reliable, probative, and substantial evidence and is in accordance with law. The judgment of the court shall be final and conclusive unless reversed, vacated, or modified on appeal. Such appeals may be taken either by the party or the agency and shall proceed as in the case of appeals in civil actions as provide in sections 2502.01 to 2505.45 of the Revised Code. Such appeal by the agency shall be taken on questions of law relating to the constitutionality, construction, or interpretation of statutes and rules of the agency, and in such appeal the court may also review and determine the correctness of the judgment of the court of common pleas that the order of the agency is not supported by any reliable, probative, and substantial evidence in the entire record.

Such appeals may be taken regardless of the fact that a proceeding was pending prior to the amendment of this section expressly authorizing such appeals, provided such appeals are perfected by the filing of notice of appeal within the time prescribed by section 2505.07 of the Revised Code.

The court shall certify its judgment to such agency or take such other action necessary to give its judgment effect.

Ohio Revised Code Section 4731.22

Grounds for refusal to grant and revocation of certificate

(A) The state medical board, by a vote of not less than five of its members, may refuse to grant a certificate to a person found guilty of fraud in passing the examination, or fraud, misrepresentation, or deception in applying for or securing any license or certificate issued by the board.

(B) The board shall, to the extent permitted by law, limit, reprimand, revoke, suspend, place on proba-

tion, refuse to register, or reinstate a certificate for one or more of the following reasons:

***

(6) A departure from, or failure to conform to, minimal standards of care of similar practitioners under the same or similar circumstances, whether or not actual injury to a patient is established:

***

(12) Violation of the conditions or limitation upon which a limited or temporary license or certificate to practice is issued:

***

(C)(1) The board shall investigate evidence which appears to show that any person has violated any provision of this chapter. Any person may report to the board under oath any information such person may have appearing to show a violation of any provison of this chapter.

(2) Any individual licensed or certified to practice or any association or society of individuals

licensed or certified under this chapter shall report to the board any information appearing to show a violation of any provision of this chapter. Any person or society who reports under this section and provides such information in good faith shall not be subject to suit for civil damages as a result thereof.

***

CASE NO. 84-1334

Office - Supreme Court, U.S.
FILED
FEB 25 1985
ALEXANDER L. STEVAS,
CLERK

In The Supreme Court of the United States

OCTOBER TERM, 1984

HARVEY J. SNYDER, JR., M.D.,
Petitioner,

v.

STATE OF OHIO, THE STATE MEDICAL BOARD,
Respondent.

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

ANTHONY J. CELEBREZZE, JR.
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13 pp

QUESTIONS PRESENTED

1. Whether a state regulatory system that authorizes the suspension or revocation of a license to practice medicine for violating the statutory criterion of "a departure from, or the failure to conform to, minimal standards of care of similar practioners under the same or similar circumstances" is violative of the Fourteenth Amendment?

2. Whether an administrative order based on reliable, probative and substantial evidence and in accordance with law is correctly affirmed by state courts on review?

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STATEMENT OF THE CASE

INTRODUCTION

On November 15, 1979, the Ohio State Medical Board, Respondent [hereinafter "Board"], issued a formal letter of citation to Petitioner, Dr. Harvey J. Snyder, Jr., setting forth six (6) allegations that Petitioner, in his pre- and post-natal care of female patients, and in his delivery of babies, violated the Medical Practice Act, Revised Code of Ohio Chapter 4731 [hereinafter R.C.]. Petitioner was advised in the Notice that the Board would consider whether to limit, reprimand, revoke, suspend, place on probation, or refuse to register or reinstate his Certificate to practice medicine. Pursuant to R.C. Chapter 119., Petitioner was advised that he was entitled to a hearing in this matter, and he requested a hearing, which was held on February 12, 1980, and March 11, 1980.

On August 13, 1980, the full Board, having reviewed the evidence, issued the following Order, effective immediately:

> Dr. Snyder shall cease all obstetrical practice in all settings, including office, home, and hospital, shall not render any pre-natal care to pregnant women, and shall not render any post-natal care to mothers or infants, and shall not deliver babies.
>
> In addition, Dr. Snyder shall make available his clinical records for review by an investigator or other agent of the Board on a monthly basis.

A copy of that Order was before the state courts as State Exhibit No. 1, in the Record of the Administrative Proceedings [hereinafter "R"] which was filed with and reviewed by the Ohio courts.

Petitioner appealed said Order to the Court of Common Pleas, pursuant to R.C. Section 119.12. (Petitioner's Appendix, p. 42). On April 9, 1981, the Court of Common Pleas issued an "Opinion and Decision" which affirmed the Board's Order. On October 21, 1981, the Ninth District Court of Appeals affirmed the lower court and upheld the Board's Order. Finally, on February 17, 1982, the Ohio Supreme Court declined to hear the case.

PROCEDURAL POSTURE

On the basis of additional evidence, setting forth similar allegations against Petitioner, the Board issued a second Notice of Opportunity for hearing letter on January 14, 1981. Petitioner again requested a hearing which was held on March 19, 1981, and June 24, 1981. At this hearing, Petitioner was represented by counsel, and witnesses were examined and cross-examined on his behalf.

The Board, on December 2, 1981, Ordered that Petitioner's license to practice medicine be indefinitely suspended, effective immediately. The Order was appealled to the Court of Common Pleas and it is solely that Order as affirmed by both the court of common pleas and court of appeals with certiorari denied by the Ohio Supreme Court, which is at issue before this Court.

The common pleas court issued its Judgment Order, September 14, 1983 [Petitioner's Appendix, p. 23] in which it found:

> . . .[T]hat there is ample reliable, probative, and substantial evidence in the record from which the Board could have concluded that Snyder departed from, or failed to conform to, 'minimal standards of care of similar practitioners under the same or similar circumstances' in his treatment of Elizabeth Cline, and in the delivery and subsequent treatment of Rhianna Cline.

From that decision the Petitioner sought review by the court of appeals. The matter was fully briefed and argued orally. That court overruled every assignment of error and affirmed the common pleas court's decision. (Petitioner's Appendix, p. 32.)

The Petitioner sought further review from the Ohio Supreme Court which denied *certiorari* as the Court of Appeals was correct in its holdings and as the case presented no question of general or public interest nor any constitutional question which has not been correctly decided by the lower courts. (Petitioner's Appendix, p. 40.)

STATEMENT OF FACTS

Briefly, the facts are that subsequent to Petitioner's license to practice medicine having been limited by the Board to prohibit him from practicing obstetrics or delivery of children, he, by his own admission, delivered

Elizabeth Cline and at least one other woman of children at his office. Further, his practices in the delivery of the Cline baby failed to conform to minimal standards of care as required by the Medical Practice Act, R.C. Chapter 4731.

The Record before the state courts was replete with reliable, probative and substantial evidence which proved the charge contained in the Notice of Opportunity for Hearing letter. The question for the state courts was whether there was reliable, probative and substantial evidence supporting a finding that Petitioner engaged in obstetrical practice after having had his license limited by the Board and whether the actions alleged regarding treatment of Ms. Cline occurred. The question of whether his treatment of Ms. Cline violated the statutory standard is neither and evidentiary one nor reviewable by the court; see, *Arlen v. State Medical Board,* 61 Ohio St. 2d 168 (1980). Even a brief review of the Record would show reliable, probative and substantial evidence to support the Board's findings.

It is undisputed that Petitioner engaged in obstetrical practice and the delivery of the Cline baby after having had his license limited by the Order of August 18, 1980. Most conclusive are his admissions. For example, in addition to acknowledging his obstetrical care of Ms. Cline he admitted:

> I had just delivered anothe woman at approximately, oh, 11 o'clock in the morning there at the office, and this other woman was still on the delivery table an hour or so later; and I remember telling her, 'We are going to have to move you

> someplace else, because a woman [Ms. Cline] just called me, her water has broke and she is coming in,' and that was about 12 o'clock.

[Transcript 2, p. 94]. He admitted his obstetrical care of Ms. Cline and the delivery of her baby. Petitioner's admissions are conclusive and he may not, in light thereof, argue that there was error as to findings of fact.

Although Petitioner disputed some facts, the Record is replete with testimony and evidence from various witnesses as to Petitioner's course of treatment of Ms. Cline and her infant. With evidence of such facts in the Record the Board exercised its expert knowledge and discretion and concluded that such conduct violated the statutory criteria set forth at R.C. 4731.22, i.e., failure to conform to minimal standards of care. (Petitioner's Appendix, p. 45.)

SUMMARY OF ARGUMENT

There is no justification for certiorari in this case. The matter involves individual relief and presents no issue of national importance.

Petitioner is attempting to have this court review factual determinations. The finding of facts is for the trier of fact. The Board's findings have been reviewed by three levels of state courts. No matter is presented for this worthy court to consider.

A statutory criteria for the regulation of health professions is not unconstitutionally vague where it specifies that departure from or failure to conform to

minimal standards of care of similar practitioners is a ground for suspension of a license. The law is settled that "unprofessional conduct" is not unconstitutionally vague. How much less vague is an explicit statutory standard?

The national law is settled on both questions raised by Petitioner. No issue worthy of review by this Honorable Court is presented.

ARGUMENT IN OPPOSITION TO CERTIORARI

This Honorable Court should not grant certiorari in this case as the matter involves only individual relief sought by a disgruntled physician who has been consistently ruled against by the judicial system of Ohio, from the administration level's initial Order to the Ohio Supreme Court's denial of certiorari. The case does not present any matter of national interest. The Supreme Court does not sit for the benefit of particular individual litigants and certiorari should not be granted except in cases involving principles the settlement of which is of importance to the public interest as distinguished from that of the parties. *Rice v. Sioux City Memorial Park Cemetary,* 349 U.S. 70, 75 S. Ct. 614, 99 L. Ed. 897 (1955).

A writ of certiorari is not a matter of right but of judicial discretion. The criteria to be considered in reviewing a petition for a writ of certiorari are set forth at Rule 17 of the rules of the Supreme Court. None of the factors to be considered under Rule 17 are met in this case. Specifically, Rule 17 provides in relevant part:

(b) When a state court of last resort has decided a federal question in a way in conflict with the decision of another state court of last resort or of a federal court of appeals.

(c) When a state court or a federal court of appeals has decided an important question of federal law which has not been, but should be, settled by this Court, or has decided a federal question in a way in conflict with applicable decisions of this Court.

The opinions of the Ohio Courts in this case do not reflect any decision of a federal question which in any way conflicts with a decision of another state court of last resort, nor has petitioner alleged any. Neither do the state decisions conflict with the decisions of any federal court.

More importantly, the Ohio Courts in this case have not decided any important questions of federal law.

The first question presented by Petitioner is without merit as it is settled that statutory criteria such as "incompetent" or "unprofessional" for the suspension or revocation of licenses will be upheld. 29 ALR 3d 489; *Brinkley v. Harsig,* (1936) 83 F.2d 351; *Re: Walker's License,* (1941) 210 Minn. 337, 300 N.E. 800; *State Board of Dental Examiners v. Savelle,* (1932) 90 Colo. 171, 8 P. 2d 693; and *Yoshizawa v. Hewitt,* (1931) 52 F.2d 411; *Yee Bow v. City of Cleveland,* (1919) 99 Oh. St. 269. In a technical profession it is impossible or impracticable to provide definite standards as to detailed

conduct and therefore general criteria will be upheld. *Matz v. the J. L. Cutis Cartage Co.,* (1937) 132 Oh. St. 271.

The Ohio Supreme Court has addressed already the language of R.C. 4731.22(B)(6) in *Arlen v. State,* (1980) 61 Oh. St. 2d 168. That Court opined that "minimal standards of care of similar practitioners under the same or similar circumstances," is similar to the "reasonably prudent man" standard of tort law. Just as a general standard is sufficient against which to evaluate conduct in a tort action – the law could not possibly specify every conceivable potentially tortious act –, so too is the general standard "minimal standards of care" sufficient to evaluate conduct in a medical regulatory proceeding – the law could not possibly specify every conceivable act that might fall below minimal standards.

Petitioner's second question would have a reviewing court resolve conflicting testimony rather than leave such matters ofr the trier of fact. The respective roles of reviewing courts and trial courts is well established and this case does not present any novel federal question that requires this Court to reconsider those time-honored functions.

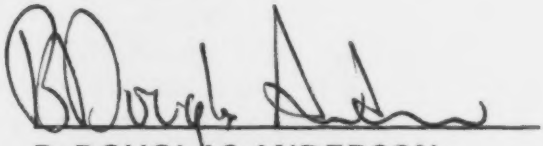
CONCLUSION

This case presents merely the "last-ditch" effort by an incompetent physician, whose license to practice medicine was correctly and properly suspended, to retain that license. There is no issue of general or substantive national public interest presented. Certiorari would only confirm the reasoning and result of the court below.

Wherefore, the Respondent, Ohio State Medical Board, asks this Court to *deny* the writ of certiorari.

Respectfully submitted,

ANTHONY J. CELEBREZZE, JR.
Attorney General of Ohio



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CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing Respondent's Brief in Opposition to Petition for Writ of Certiorari has been forwarded to the petitioner through the office of his Counsel of Record, Robert Bruce Henn, Henn and Cain, P.O. Box 611, Medina, Ohio 44258-0611, and Bernard L. Moutz, 3808 Mogadore Road, Mogadore, Ohio 44260. I further certify that all persons required to be served have been so served. Said mailing was made by depositing the appropriate number of copies in the U.S. Mail, first class, postage prepaid, this 21st day of December, 1984.

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